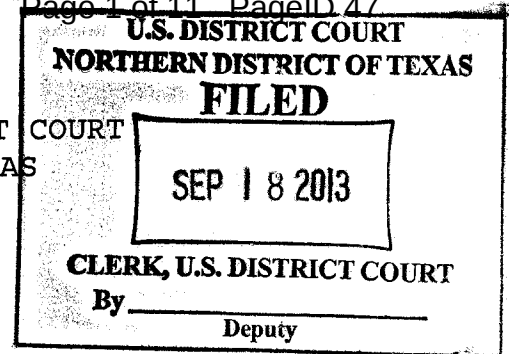


IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION



KAMRAN J. ROSS,

Plaintiff,

VS.

UNITED STATES OF AMERICA,
ET AL.,

Defendants.

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NO. 4:13-CV-573-A

MEMORANDUM OPINION

and
ORDER

Plaintiff, Kamran J. Ross, proceeding pro se and in forma pauperis, brought this action against United States of America, R. Tamez ("Tamez"), M. Pearce ("Pearce"), S. Fick ("Fick"), R. Ramos ("Ramos"), J. Riley ("Riley"), J. Bengford ("Bengford"), M. Guttierrez ("Guttierrez"), K. Goldsby ("Goldsby"), and R. Lovings ("Lovings"). Each of the individual defendants is sued in his or her individual capacity. Plaintiff asserted claims against the individual defendants pursuant to Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); against United States, plaintiff brought a claim pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680.

I.

Initial Screening of Plaintiff's Claims

Because plaintiff is proceeding in forma pauperis, his complaint is subject to preliminary screening under 28 U.S.C. § 1915(e)(2)(B). Section 1915(e)(2)(B) provides for sua sponte dismissal if the court finds that the complaint is either frivolous or fails to state a claim upon which relief may be granted. A claim is frivolous if it "lacks an arguable basis in either fact or law." Neitzke v. Williams, 490 U.S. 319, 325 (1989). A complaint fails to state a claim upon which relief can be granted when, assuming that all the allegations in the complaint are true even if doubtful in fact, such allegations fail to raise a right to relief above the speculative level. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation marks and citations omitted).

II.

Plaintiff's Complaint

Plaintiff was previously incarcerated in the Houston Unit at FCI-Fort Worth.¹ The complaint alleges that over the years the Bureau of Prisons made various alterations to the prison facilities that resulted in an increased number of prisoners in

¹The complaint alleges that plaintiff was released to a halfway house in Houston, Texas, in January 2013.

plaintiff's unit. The sum of the allegations in the complaint is that the prison was overcrowded and, as a result, excessively noisy. Because of the noise, plaintiff was often unable to get a full night's sleep. Plaintiff contends that Bureau of Prisons officials turned a deaf ear to his complaints about the noise, his inability to get eight hours' sleep, and the resulting effects on his health. Plaintiff claims that the overcrowding and excess noise amounted to cruel and unusual punishment and that the individual defendants acted with deliberate indifference. Plaintiff also claims that United States, "as a result of the negligent, reckless, wanton and intentional conduct" of the individual defendants, denied him safe and healthy conditions of confinement. Compl. at 19.

Having now considered all of the allegations in the complaint, the court concludes that plaintiff has failed to state a claim upon which relief may be granted as to any defendant, and that all of plaintiff's claims and causes of action should be dismissed.

III.

Analysis

A. Bivens Claims

"The Constitution does not mandate comfortable prisons . . . but neither does it permit inhumane ones, and it is now settled

that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." Farmer v. Brennan, 511 U.S. 825, 832 (1994) (internal citations omitted). The Eighth Amendment's prohibition against cruel and unusual punishment thus applies to conditions of confinement; however, "[t]o the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

Two requirements must be met in order for plaintiff to allege a constitutional violation related to the conditions of confinement: the condition must objectively be "so serious as to deprive prisoners of the minimal civilized measure of life's necessities, as when it denies the prisoner some basic human need," and the court must subjectively determine whether prison officials were "deliberately indifferent to inmate health or safety." Woods v. Edwards, 51 F.3d 577, 581 (5th Cir. 1995) (per curiam) (internal citations and quotation marks omitted). The allegations in the complaint fail to satisfy either the subjective or objective requirement.

Plaintiff has failed to allege a condition that was so serious it deprived him of any of life's basic necessities. As to his claim of overcrowding, lack of space alone does not

constitute cruel and unusual punishment. Ruiz v. Estelle, 666 F.2d 854, 858 (5th Cir. 1982); Johnson v. Tex. Bd. of Criminal Justice, 281 F. App'x 319, 320 (5th Cir. 2008) (per curiam).

Claims pertaining to overcrowding must be viewed in relation to other conditions of confinement, including "sanitation, provision of security, protection against prisoner violence, and time and facilities available for work and exercise." Ruiz, 666 F.2d at 858. Although plaintiff discusses the ratio of toilets to prisoners, he does not allege that he was ever deprived of the use of a toilet or shower, nor does he allege anything pertaining to security, protection against prisoner violence, or the facilities available for him to work or exercise.

Under similar circumstances, the Fifth Circuit affirmed the dismissal of a prisoner's Bivens and FTCA claims pertaining to overcrowding where the prisoner failed to allege that he had been injured, denied or delayed medical care, or suffered other serious harm to his health and safety as a result of the overcrowding. Lineberry v. United States, 436 F. App'x 293, 295 (5th Cir. 2010) (per curiam). Likewise, the overcrowding alleged by plaintiff does not rise to the level of a constitutional violation. Id.; see also Johnson, 281 F. App'x at 321.

Plaintiff's claim regarding excess noise fares no better. Sleep is a basic human need, and conditions intended to deprive

prisoners of sleep may violate the Eighth Amendment. Harper v. Showers, 174 F.3d 716, 720 (5th Cir. 1999). Although plaintiff claims the excess noise prevented him from getting a full night's sleep, he alleged nothing to show "the existence of noise intentionally designed to deprive him of sleep" or sufficient to state a constitutional violation. Johnson, 281 F. App'x at 322.

Instead, the excessive noise complained of by plaintiff appears to be of the type generally associated with the fact of incarceration: "[m]echanical noise such as . . . exhaust fans, ice machines, heating and air conditioning systems;" prisoners "talking loudly, shouting, trash-talking, complaining and protesting, ear-piercing cheering for their sports teams and loud clapping and laughter;" the "crack from a table top when a card or a domino is slammed down," while on-lookers "shout[ed] out curse-laced commentary;" and similar types of noise. Compl. at 10. Nowhere does plaintiff allege that prison officials arranged for excessive noise for the purpose of depriving him of sleep. Plaintiff has failed to allege that the excessive noise rose to the level of a constitutional violation. Johnson, 281 F. App'x at 322; Lunsford v. Bennett, 17 F.3d 1574, 1580 (7th Cir. 1994) (allegations of loud noise in prison failed to state a constitutional violation); Lacy v. Collins, No. 95-20033, 1995 WL 535114, at *4 (5th Cir. Aug. 8, 1995) (per curiam) (same).

As an additional basis for the dismissal of all claims against the individual defendants, plaintiffs suing government officials in their individual capacities must allege the specific conduct of that official that gives rise to a constitutional violation. Thompson v. Steele, 709 F.2d 381, 382 (5th Cir. 1983). Yet very few allegations in the complaint identify actions by any of the individual defendants. The few that do fail to allege any actionable conduct that would give rise to a claim under Bivens. For example, plaintiff claims that Gutierrez, Goldsby, and Lovings gave preferential treatment to certain prisoners, "always minorities," Compl. at 16, by assigning them a living area with a door. However, he fails to offer any specific examples where this purportedly occurred, and prisoners have no constitutional right to be housed in one type of room or another within a prison facility.

Finally, the court notes that several pages of the complaint are devoted to a description of jail standards purportedly set by the American Correctional Association ("ACA") or by state or national building codes. To the extent plaintiff attempts to base any claim on alleged violations of these standards, he has failed to state a claim for relief. ACA standards "do not establish constitutional minima," but rather provide factors a court may consider in evaluating the conditions of confinement.

Patchette v. Nix, 952 F.2d 158, 163 (8th Cir. 1991). Similarly, noncompliance with state or national building codes does not rise to the level of a constitutional violation.

B. FTCA Claim

The FTCA provides a limited waiver of the sovereign immunity of the United States for torts committed by federal employees acting within the scope of their employment. 28 U.S.C. § 1346 (b); Berkovitz by Berkovitz v. United States, 486 U.S. 531, 535 (1988). The FTCA authorizes civil actions for damages against the United States for personal injury or death caused by a government employee's negligence when a private individual under the same circumstances would be liable under the substantive law of the state in which the negligence occurred. 28 U.S.C. §§ 1346(b), 2674; Hollis v. United States, 323 F.3d 330, 334 (5th Cir. 2003).

Although the FTCA is generally a waiver of United States's sovereign immunity, the statute also carves out certain exceptions. Relevant here is an exception for claims based on the "exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Exceptions to the FTCA waiver of immunity must be strictly construed in

favor of United States. Truman v. United States, 26 F.3d 592, 594 (5th Cir. 1994).

Courts apply a two-part test to determine whether the discretionary function exception applies to a given case, bearing in mind that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." Berkovitz by Berkovitz, 486 U.S. at 536 (citation omitted). First, the court must determine "whether the action is a matter of choice for the acting employee," meaning it must involve an element of "judgment or choice." Id. The discretionary function exception does not apply when a "federal statute, regulation, or policy specifically prescribes" a course of action for the employee to follow. United States v. Gaubert, 499 U.S. 315, 322 (1991) (emphasis added) (citing Berkovitz by Berkovitz, 486 U.S. at 536). Second, the court must decide if the judgment involved is "of the kind that the discretionary function exception was designed to shield." Id. at 322-23.

Here, plaintiff's claims against United States are grounded on the alleged overcrowding and excessive noise. Although not expressly stated in the complaint, such allegations are tantamount to a breach of the duty imposed on the Bureau of Prisons by 18 U.S.C. § 4042(a)(2) to "provide suitable quarters

and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States." Similarly, 18 U.S.C. § 3621(b) vests in the Bureau of Prisons discretion in the designation, classification, and placement of prisoners.

Courts have held that § 4042 imposes a general duty to house and care for prisoners, but does not mandate a specific manner in which to carry out that duty. See, e.g., Cohen v. United States, 151 F.3d 1338, 1342 (11th Cir. 1998); Calderon v. United States, 123 F.3d 947, 950 (7th Cir. 1997). Thus, FTCA complaints of overcrowding, understaffing, and similar issues pertaining to a prisoner's living quarters are routinely found to be excluded from the FTCA by the discretionary function exception. See, e.g., Cohen, 151 F.3d at 1343 (decisions as to placement and classification of prisoners within prison facility within discretionary function); Antonelli v. Crow, No. 08-261-GFVT, 2012 WL 4215024, at *3 (E.D. Ky. Sept. 19, 2012) (dismissing FTCA claims alleging, inter alia, overcrowding); Lineberry v. United States, No. 3:08-CV-0597-G, 2009 WL 763052 at * 6 (Mar. 23, 2009), adopting recommendation, No. 3:08-CV-0597-G, 2008 WL 2246955 (N.D. Tex. May 30, 2008) (FTCA complaint of overcrowding barred by discretionary function exception); Jones v. United States, No. 09-00976, 2011 WL 2117603, at *5 (W.D. La. May 4,

2011) (same). The same result is warranted here: plaintiff's allegations concerning overcrowding and the resulting noise implicate the Bureau of Prisons's responsibilities under § 4202(a)(2), and such duties fall within the discretionary function exception to the FTCA.

* * * *

To sum up, plaintiff has failed to allege anything as would state a claim for relief against any defendant.

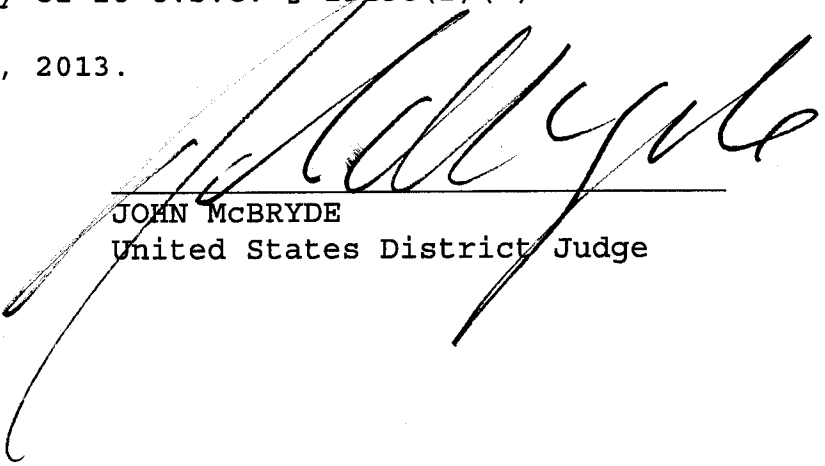
IV.

Order

Therefore,

The court ORDERS that all claims and causes of action brought by plaintiff, Kamron Ross, against defendants, United States of America, Tamez, Pearce, Fick, Ramos, Riley, Bengford, Guttierrez, Goldsby, and Lovings, be, and are hereby, dismissed pursuant to the authority of 28 U.S.C. § 1915e(2)(B).

SIGNED September 18, 2013.



JOHN MCBRYDE
United States District Judge